In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-568

VILMA ARRIAZA, CHARLOTTE HIGGINS, KATHARYNE ANNE MALLOY and VIRGINIA WARD,
Petitioners,

vs.

CROCKER NATIONAL BANK, a National Banking Association,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition

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The respondent Crocker National Bank respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is not reported.

QUESTIONS PRESENTED

A. Is an appeal by two dismissed plaintiffs rendered moot when their original class action was continued by a co-plaintiff to a full settlement, when they have accepted the terms of that settlement, and when they have certified to the Court of Appeals that they no longer have an interest in the outcome of the appeal?

B. If not, can other dismissed plaintiffs who did not file a timely appeal of their dismissal intervene in an appeal by others and seek class representative status for claims not covered by the full settlement of their original action?

STATEMENT OF THE CASE

On November 5, 1975, ten plaintiffs, including the four petitioners, filed a complaint[1] alleging that Crocker National Bank had discriminated against them and others similarly situated on the basis of sex. On the motion of Crocker National Bank, nine of the ten plaintiffs were dismissed from the action for having failed to meet the jurisdictional prerequisites to instituting suit. Two of those nine dismissed plaintiffs, Arriaza and Higgins, appealed their dismissal to the United States Court of Appeals for the Ninth Circuit. The remaining seven, including Malloy and Ward, made no such appeal.

While the appeals of Arriaza and Higgins were pending, the litigation continued before the district court. On April 13, 1977, through stipulation of the parties, the court certified a class of all females employed in the California

1. *Levine, et al. v. Crocker National Bank*, C-75-2333-CBR, in the United States District Court for the Northern District of California (Renfrew, J.).

facilities of Crocker National Bank. Then, still prior to resolution of the appeals of Arriaza and Higgins, the action was settled and the settlement given final approval by the district court, from which no appeal was taken. The settlement, contrary to the assertions in the Petition, was a full and complete settlement covering "all claims which have been or could have been advanced on behalf of the classes or any members thereof . . . ." (Consent Decree in Full Settlement of Action, finally approved by the district court on December 29, 1977, at 4). Termination and refusal to hire claims were excluded from the class definition. All class members were sent notices regarding the settlement and were advised of their opportunity to exclude themselves from the class. Neither Arriaza nor Higgins exercised that option and thus they became bound by the settlement.

On the basis of the Consent Decree in Full Settlement of Action, the Ninth Circuit requested that the parties to the appeal brief the issue of whether the Arriaza and Higgins appeals were rendered moot by the settlement. In their papers to the Court of Appeals, Arriaza and Higgins acknowledged that neither of them had an interest in the outcome of their appeal. Consequently, the appeal was dismissed as moot. However, they suggested to the Court of Appeals that Malloy and Ward, also persons who had been dismissed as plaintiffs from the *Levine* action over a year and one-half before, but who had not appealed the dismissal of their actions, could be substituted for appellants. On June 8, 1978, the Ninth Circuit dismissed the appeals of Arriaza and Higgins as moot, and further concluded that Ward and Malloy could not be substituted for appellants Higgins and Arriaza. It therefore was unnecessary for the Court to address the merits of the appeal.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Properly Concluded That the Appeals of Arriaza and Higgins Are Moot

When Arriaza and Higgins appealed their dismissal as plaintiffs, the action which they had instituted was continued by a co-plaintiff. That action was ultimately settled and notices were sent to all class members advising them of the terms of the settlement and of their opportunity to exclude themselves from the class if they so desired. As they state in their Petition, "Arriaza and Higgins did not opt out of the settlement and neither of them have claims which survive the settlement." (Petition at 4) Therefore, it must necessarily follow that because they accepted the full settlement of the action which they instituted, and because they no longer have an interest in the outcome of their appeals, their appeals are moot.

Any attempt by Arriaza and Higgins to continue to pursue this appeal, when their stake in its outcome has abated, constitutes nothing more than an invitation to this Court to issue an advisory opinion. It has been well-settled since at least 1793 that the jurisdiction of the federal courts is limited to cases and controversies, and that advisory opinions are without that jurisdiction. U.S. Const. Art. III; *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968); *see* "Correspondence of the Justices," *in* Hart & Wechsler, *The Federal Courts and the Federal System 64-66 (1973 ed.)*.

II. There Is No Authority for Petitioners' Argument That the Appeal May Continue Notwithstanding the Mootness of the Claims of Arriaza and Higgins

In a futile attempt to cure the mootness of their appeal, petitioners Arriaza and Higgins brought Ward and Malloy forward when the Court of Appeals asked whether the

appeal should be dismissed as moot. Ward and Malloy failed to file a notice of appeal when their individual claims were dismissed. They may not appeal a judgment which has become final.

In addition, petitioners apparently argue that because Ward and Malloy could be potential class representatives for the limited claims not covered by the class definition in the settled case, they should be permitted by this Court to maintain some new class action. In considering this argument, one must keep in mind the question raised by the initial appeal: whether the District Court's dismissal of the complaints of Arriaza and Higgins was proper. No other question related to other persons or to a class was before the Ninth Circuit, nor would such a question be properly before this Court.

Thus, Ward and Malloy cannot appeal as to the dismissal of their complaints because that judgment became final without appeal. Neither do these two petitioners have standing to pursue the appeal of Arriaza and Higgins, whose claims are now admittedly moot. Finally, no class questions were the subject of any appeal to the Ninth Circuit, and could not have been, since the only class action which existed has proceeded to final judgment well after the appeals were taken. There is no class action or issue currently in existence which could be the subject of any appeal in this matter.[2]

Petitioners evidently would have this Court believe that unless the appeals of Arriaza and Higgins are allowed to continue notwithstanding their mootness, some unidentified group of persons would be harmed. This argument

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2. As a result the authority cited by petitioners at pages 6 and 7 of the Petition is inapposite for it relates to class matters which were not fully and completely settled.

is without merit. As to claims covered by the class settlement, the class is bound. As to other claims, no one is bound by the settlement.

III. There Is No Conflict Between the Circuits or with the Opinions of This Court, Nor Is Any Significant Question Presented for Review.

Petitioners, in an attempt to have this Court address an issue which the Ninth Circuit concluded it need not consider, have set forth arguments regarding whether 180 suit-free days must pass from the date that the Equal Employment Opportunity Commission assumes jurisdiction of an employment discrimination charge before suit may be instituted.[3] Not only is this question inappropriate for presentation to the Court because it was not decided by the Court below, it is not arguably encompassed by the questions appellants have requested this Court to review.[4]

Once beyond the inappropriate argument regarding the 180-day issue, the Court is left with the two questions set forth at the beginning of this Response. With respect to those two issues, and in light of United States Supreme Court Rule 19, petitioners have patently failed to establish that either the Ninth Circuit's decision of mootness or its denial of the request for substitution of appellants is in conflict with either the decisions of the other circuits or of this Court. Indeed, no such conflict exists.

Furthermore, the mootness and substitution questions do not present any significant legal issues for review.

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3. *But see Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355 (1977), wherein this Court stated that a "private right of action does not arise until 180 days after a charge has been filed." *Id.* at 361.

4. *See* United States Supreme Court Rule 23(c), which concludes, "Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

CONCLUSION

For the foregoing reasons, respondent Crocker National Bank respectfully requests this Court to deny Appellants' Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

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